United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1845

(41594)

To be argued by
ALFRED WEINSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

FRANCINE NEWMAN,

Plaintiff-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant-Appellee.

Appeal From the United States District Court for the Eastern District of New York

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

FRANCINE NEWMAN,

Plaintiff-Appellant,

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THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK,

Defendant-Appellee.

Appeal From the United States District Court for the Eastern District of New York

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APPELLEE'S BRIEF

Preliminary Statement

Plaintiff appeals from a judgment of United States District Court for the Eastern District of New York, entered February 19, 1974, upon a decision and order of TRAVIA, J., which, granting summary judgment in favor of the defendant on the ground of res judicata, dismissed the complaint.

The Issue

Plaintiff, a school teacher, was placed on involuntary sick leave following medical examinations the first of which was intitated pursuant to authority conferred by the Education Law of the State of New York. The issue is whether plaintiff has a sufficient claim which is not barred by the outcome of a New York Supreme Court* proceeding brought by her against the instant defendant in which she sought restoration to duty and other relief.

She argues that she could not in that proceeding have attacked the constitutional validity of the statute, so that she may do so in this action. We argue that she could have attacked it in that proceeding, and that, in any event, it is valid.

We rely upon the ground advanced by the District Judge, believing that it is clearly dispositive of the appeal. However, we note that the complaint asserts jurisdiction under 28 U.S.C. §1343 and 28 U.S.C. §1331. There is doubt of jurisdiction under the former and of sufficiency of the complaint under the latter.

The defendant is a body corporate. Education Law §2551. It "stands as a substitute" for the State, "a corporate agency of the state for the purpose of administering educational matters". *Matter of Hershfield* v. *Cook,* 227 N.Y. 297, 301 (1919); cf. *Matter of Daniman* v. *Board of Education of City of New York,* 306 N.Y. 532, 542 (1959), reversed 350 U.S. 551. Accordingly, it is not a

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* Additional references to courts and to statutes are to those of New York State, unless otherwise indicated.

person within the meaning of 42 U.S.C. §1983. *Blanton* v. *State University of New York,* 489 F. 2d 377, 382 (2nd Cir., 1973). Also, by virtue of such character, it is strongly to be doubted that a cause of action for damages is stated, even though jurisdiction is established under 28 U.S.C. 1331. *Fisher* v. *City of New York,* 312 F. 2d 890 (2nd Cir., 1963), cert. den. 374 U.S. 828; *Perzanowski* v. *Salvio,* 369 F. Supp. 223, 228-231 (D. C. Conn., 1974); *cf. Bivens* v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 456 F. 2d 1339, 1346-1347 (2nd Cir., 1972).

Facts

(a)

On January 26, 1970, the Principal of a high school in New York City, where plaintiff was a regular teacher, recommended to the Superintendent of Schools that a medical and physical examination be given to plaintiff. The reasons for the recommendation were stated in a report which accompanied it. The recommendation stated that a copy of it and of the report had been sent to plaintiff (28, 72-78).*

Acting pursuant to Education Law § 2568, the Superintendent required plaintiff to appear for examination (58). There is nothing in the record to indicate that plaintiff had sought to contradict the contents of the report or objected to the scheduled examination.

She was examined by two physicians, later by a psychiatrist, and, after that, by a psychologist (124-125). On July 31, 1970, following these examinations, and pursuant

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* Numbers in parentheses refer to pages of "Appellant's Record On Appeal," unless otherwise indicated.

to recommendation of the Medical Director of the defendant Board, plaintiff was placed on leave of absence from September 11, 1970 through June 30, 1972. At that time, she was advised, it would be necessary to obtain Medical Bureau approval before returning to duty (29, 36, 91, 164).

On September 4, 1970, plaintiff sought review of the Medical Director's recommendation. This was denied, and the denial was sustained at each step of the collective bargaining grievance process invoked by plaintiff (30, 97-110).

It was not until September 8, 1971 that plaintiff requested an examination for reinstatement (111). She was examined by two physicians and, later, by a psychiatrist (30). On January 18, 1972, plaintiff was notified that she had been placed on leave of absence for the period September 10, 1971—June 30, 1972 (47).

(b)

On March 2, 1972 plaintiff began a Supreme Court proceeding pursuant to Article 78 of the Civil Practice Law and Rules (47). The relief requested was, in effect, annulment of all prior action taken by the Board, restoration of sick leave credit and payment of salary lost after exhaustion of sick leave (37-38). As we read her petition and her reply in that proceeding (120-134, 139-152), her allegations, so far as they are factual, are as broad as those in her complaint in the instant case. Included in the lengthy petition was a charge of "violation of petitioner's due process and equal protection rights", and disregard of her right to a "due process hearing on charges as a prerequisite to suspension" (131).*

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* "Appellant's Record On Appeal" at p. 17 quotes Judge Travia's opinion as stating "she did not raise the issue of due process violations. . .". The word "not" does not appear in the original.

On July 6, 1972 an order was made in that proceeding which (a) denied all relief with respect to the period 1970-1971 and (b) remanded to the Board the determination with respect to the year 1971-1972 "to consider the medical reports of petitioner's physicians and the reexamination of the petitioner if conducted as a basis for a new recommendation by the Board's Medical Director" regarding petitioner's restoration to duty (38-39).

On July 31, 1972, the Appellate Division of the Supreme Court denied the instant plaintiff's motion for leave to appeal. On September 28, 1972, the Court of Appeals dismissed her motion for leave to appeal to that Court and for a stay (39). Plaintiff has since refused to submit to reexamination (49).

(c)

As we read the opinion of the Supreme Court, it purported to deal with the merits of petitioner's complaints regarding the period 1970-1971, and it concluded against them (163-167). The opinion also recited that "In any event . . .", the proceeding with respect to that period was barred by the Statute of Limitations (167).

With regard to 1971-1972 the opinion was to the effect that the record was inadequate to show justification for the determination to place the instant plaintiff on sick leave (168-170).

POINT I

Res judicata is a bar to this action.

(a)

Plaintiff is mistaken in her opening position that she could not attack the validity of Education Law §2568 in her New York proceeding. The New York cases cited by her support only the proposition that the constitutionality of legislative action may not be tested in an Article 78 proceeding when the only relief which can be practically helpful is a declaration of invalidity. Thus, where one seeks in an Article 78 proceeding to compel the issuance of a license on the ground that it had been improperly denied, one may not assert that the statute requiring the license is unconstitutional, for the invalidity of the statute would not entitle the petitioner to the license. *Matter of Pardee* v. *Finkelstein,* 193 Misc. 269 (Sup. Ct., N.Y. Co., 1948), aff'd 275 App. Div. 659 (1st Dept., 1949); *Matter of Wong* v. *Finkelstein,* 299 N.Y. 206 (1949), aff'g 275 App. Div. 686 (2nd Dept., 1949); *Matter of Overhill Building Co.* v. *Delaney,* 28 NY 2d 449 (1971); *Matter of Lakeland Water District* v. *Onondaga County Water Authority,* 24 NY 2d 400 (1969).

But, where the constitutional validity of a statute must be decided as an incident of a determination as to whether a petitioner is entitled to the constraint he seeks to impose upon the respondent in an Article 78 proceeding, the constitutional issue will be decided. Examples abound: *Matter of Callum* v. *O'Mara,* 43 AD 2d 140 (2nd Dept., 1973), aff'd 33 NY 2d 357; *Matter of 241 East 22nd Street Corp.* v. *City Rent Agency,* 33 NY 2d 134 (1973); *Matter of Golden* v. *Planning Board of Ramapo,* 37 AD 2d 236 (2nd Dept., 1971), reversed 30 NY 2d 361 (1972); *Matter of Dickens* v. *Ernesto,* 30 NY 2d 61 (1972); *Matter of Corning* v. *Donohue,* 29 NY 2d

209 (1971); *Matter of 300 West 154th St. Realty Co.* v. *Department of Buildings,* 26 NY 2d 538 (1970); *Matter of Cromwell* v. *Ferrier,* 19 NY 2d 263 (1967); *Matter of Roosevelt Raceway* v. *Monaghan,* 9 NY 2d 293 (1961); *Matter of Zorach* v. *Clauson,* 303 N.Y. 161 (1951); *Matter of Murray* v. *LaGuardia,* 291 N.Y. 320 (1943).

Moreover, even if the form of petitioner's proceeding were improper, had she challenged the constitutional validity of §2568, the proceeding could have been treated as one maintained in appropriate form, so long as the necessary parties were before the Court. *Matter of Gold* v. *Lomenzo,* 26 NY 2d 468, 476, footnote 4 (1972). Indeed, it would have been error to dismiss the proceeding. *Kovarsky* v. *Housing and Development Administration,* 31 NY 2d 184, 192 (1972); *Matter of Phelan* v. *Theatrical Protective Union,* 22 NY 2d 34, 41 (1968). Since the Principal of plaintiff's school and the Board were parties to her Supreme Court case (51), there was no impediment to an attack upon the statute allegedly asserted to be the justification for their action. True, notice to the New York Attorney-General would have been required, had a constitutional attack been made (Executive Law, §71, CPLR 1012, subd. b), but that requirement did not prevent an attack in the first instance. *Cf. Matter of Jerry* v. *Board of Education,* 44 AD 2d 198, 230 (4th Dept., 1974).

Plaintiff's Supreme Court petition alleged that the Principal's report "contains no facts or circumstances upon which a recommendation for medical examination could legally be predicated in accordance with the Education Law, Section 2568" (123). Presumably, this is the basis for her present observation (Br. p. 3) that "a party may not seek to avail himself of the remedies afforded by an enactment and attack the validity of the enactment in the same proceeding." Whatever might otherwise be the ap-

plicability of that observation, it has not applied to New York practice since 1963. *Kovarsky* v. *Housing and Development Administration,* 30 NY 2d 184, 192 (1972).

(b)

Plaintiff does not appear to dispute the District Court's statement (13) that when a judgment is based upon alternative theories, including one on the merits, a subsequent action for the same cause is barred. See *Stokke* v. *Southern Pacific Co.,* 169 F. 2d 42, 43 (10th Cir., 1948); *cf. United States* v. *Title Insurance Company,* 265 U. S. 472, 486 (1924). That proposition is applicable here.

In so arguing, we do not respond to plaintiff's statement (Br., p. 3) that the New York "proceeding was biased by the Statute of Limitations", for we do not know what this statement means. We submit that the introductory phrase used by the Supreme Court, "In any event . . .", means "Aside from other considerations," indicating that the Statute of Limitations was held to be a separate independent ground of the Court's judgment. Obviously, if in the Court's view a disposition could not be made without necessary reliance upon the Statute of Limitations, there is no explanation for its use of the term "In any event . . .".

Moreover, it is necessarily implicit in the Court's disposition with regard to the 1971-1972 period that it determined that there was no procedural defect in the enforced leaves. If there were, such a ground would have been mentioned, and, at least, a different procedure on the remand would have been prescribed. But the 1971-1972 determination was annulled on the substantive ground that the record did not show a reasonable basis for the enforced leave (169). The order denied even the minimal

relief that plaintiff be furnished with a copy of the medical reports made to the Board by its Medical Bureau (38).

(c)

Except for the argument that she could not in the Article 78 proceeding attack the constitutionality of Education Law §2568, an erroneous position as we have shown (*supra,* pp. 6-7), plaintiff does not suggest that for purposes of the application of the doctrine of *res judicata* the New York proceeding and the instant case rest upon different causes of action. If they are not different, then the doctrine precludes litigation of matter that could have been passed upon in the first instance. *Taylor* v. *New York City Transit Authority,* 433 F. 2d 665 (2nd Cir., 1970); *Grubb* v. *Public Utilities Commission,* 281 U.S. 470, 478-479 (1930). Accordingly, it is immaterial that, as plaintiff asserts (Br., p. 4-5), "The Constitutional issues raised by the District Court pleadings were not raised or determined in the State Court."

An excess of caution prompts us to note that the assertion is not only immaterial but also incorrect. Plaintiff's Supreme Court proceeding invoked her "due process and equal protection rights" (*supra,* p. 4). She has here represented to the District Court that in the New York Courts she "sought the release of her medical records from defendant, a hearing on the issue of her competency to perform her duties in her chosen profession, and the appointment of independent psychiatrists to evaluate her mental and emotional health" (31).

That the Supreme Court did not expressly reject her assertions does not mean that they were not determined. See *Tang* v. *Appellate Division of N.Y. Supreme Court, First Dept.,* 487 F. 2d, 138, 141, footnote 2 (2nd Cir.,

1972). The Supreme Court could not have ordered as it did without necessarily passing upon her asserted rights. The denial of the remedies to which she would have been entitled, if there had been a violation of those rights and she had not waived the violation, could not be supported except on a determination that there was no violation of which she was in a position to complain.

POINT II

Assuming that plaintiff could not, in the Article 78 proceeding, attack the facial validity of Education Law §2568, she may do so now. But her other constitutional complaints could have been entertained in that proceeding.

Section 2568 is facially valid.

(a)

Assume we are in error in our position that Education Law §2568 could have been attacked on constitutional grounds in plaintiff's Article 78 proceeding. It would follow that it may be attacked here; but other constitutional objections may not be litigated here, so long as they could have been asserted in that proceeding.

A charge of due process violations not purportedly authorized by statute and resulting from administrative or quasi-judicial action may be heard in an Article 78 proceeding. This is so clear as to require only the citation of the leading New York case of *Matter of Hecht* v. *Monaghan,* 307 N.Y. 461, 470 (1954), and of a more recent example such as *Matter of Murray* v. *Murphy,* 24 NY 2d 150, 157 (1958). Also, as plaintiff recognizes (Br., p. 2), an Article 78 proceeding may properly challenge the unconstitu-

tional application of a constitutional ordinance. At best for plaintiff, then, she is here limited to an attack upon the facial validity of Education Law §2568. We submit it is valid.

(b)

The statute requires that the findings upon the examination are to be reported to the Superintendent of Schools and may be "referred to and considered for the evaluation of service of the person examined or for disability retirement." It does not purport to prescribe the procedure to be used in such reference and consideration. Nor is there a legislative history which requires that a prescription be read into it.*

At worst, from a constitutional viewpoint, the statute is indifferent regarding how the findings are to be processed after they are reported to the Superintendent of Schools. Thus, the case is radically different from *Snead* v. *Department of Social Services*, 355 F. Supp. 764 (D.C., S.D.N.Y., 1973), judgment vacated U.S. , 42 LW 3630 (May 14, 1974), in which the statute involved provided for an enforced leave of absence following a medical examination, and its history precluded reading into it a requirement of a constitutionally adequate hearing prior to the ordering of the leave.

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* Apparently the statute was enacted in order to empower the Superintendent of Schools to direct an examination. It had earlier been held that he had no such power. See *Matter of Groad* v. *Board of Education*, 13 Misc 2d 471 (Sup. Ct., Kings Co., 1958), and compare with *Matter of Board of Education of City of New York* v. *Graves*, 175 Misc. 205, aff'd 160 App. Div. 1115 (3rd Dept., 1941).

It has been held that §2568 does not give the teacher a right to examine the medical reports made to the Superintendent of Schools. *Silverman* v. *Moss,* 107 N.Y. Supp. 2d 475 (Sup. Ct., Kings Co., 1951); *Matter of Kropf* v. *Board of Education,* 34 Misc 2d 8, 9 (Sup. Ct., Kings Co., 1962), aff'd 18 AD 2d 919 (2nd Dept., 1963). But, if it be assumed that a teacher is constitutionally entitled to copies of the reports before they can be used to justify a forced leave, there is no statutory bar. The statute does not purport to prevent her from obtaining a copy. The statute is indifferent, *i.e.,* immaterial. In this regard nothing has to be read into it in order to save the constitutionality of the provision that the findings shall be reported to the Superintendent of Schools.

There remains the constitutionality of the grant of power to the Superintendent of Schools to direct a medical examination. It is to be noted that the recommendation may be made only by a person under whose supervision or direction the teacher is employed. *Matter of Gordon* v. *Board of Education,* 45 Misc 2d 28 (Sup. Ct., Kings Co., 1964). The report in support of the recommendation must recite sufficient facts and justification to protect against needless harassment. *Application of Munter,* 225 N.Y.Supp. 2d 108 (Sup. Ct., Kings Co., 1962), aff'd 17 AD 2d 854 (2nd Dept., 1962); *Matter of Groad* v. *Jansen,* 13 Misc 2d 741 (Sup. Ct., Kings Co., 1958).

This Court has held that there need be no preliminary adversary hearing as to justification for an examination such as was here required by the Superintendent of Schools. *Leonard* v. *Sugarman,* 466 F. 2d 1366 (1972). The Court of Appeals for the Ninth Circuit disagrees. *Stewart* v. *Pearce,* 484 F. 2d 1031 (1973). There is no need, in this case, to resolve the conflict, for here the

question is only that of the facial validity of the statute. If a hearing is constitutionally required, the requirement may be read into the statute under well established New York Law, since there is no apparent statutory intent to the contrary. See, *e.g., Matter of Coates,* 9 NY 2d 242, 252-253 (1961), app. dism. 368 U.S. 34; *People* v. *Finkelstein,* 9 NY 2d 342, 345 (1961); *Matter of Bell* v. *Waterfront Commission,* 20 NY 2d 54, 62 (1967); *Matter of Buttonow,* 23 NY 2d 385, 393 (1968); *Matter of Hecht* v. *Monaghan,* 307 N.Y. 461, 469 (1954).

Finally, we note that the Principal gave plaintiff a copy of his recommendation and supporting report. It does not appear that she sought to answer the report or to challenge the Superintendent's direction that she be examined. Under such circumstances, we submit, she waived her right to challenge the statutory power of the Superintendent of Schools to direct an examination. She should not be permitted to remain silent, gamble on the outcome, and then seek to upset an expensive, time-consuming proceeding on a ground the validity of which could have been determined before the commitment of time, energy and money was made. *Cf. Taylor* v. *N.Y.C. Transit Authority,* 433 F. 2d 665, 670 (1970).

CONCLUSION

The judgment appealed from should be affirmed.

July 16, 1974

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 16 day of July 19 74, he served the annexed Appellees Brief upon Gene Ann Condon Esq., the attorney for the Plaintiff Appellant herein by depositing 3 copys of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No 26 W 11 St in the Borough of MAN, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 16 day of July 1974

John Calia

Carlos M Rodriguez

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 323-50M-701108(71)